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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTINA ACUNA,

Defendant and Appellant.

B202575

(Los Angeles County
Super. Ct. No. LA051415)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Richard H. Kirschner, Judge. Affirmed with directions.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec
and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Christina Acuna appeals from the judgment entered following a jury trial in which she was convicted of gross vehicular manslaughter while intoxicated, vehicular manslaughter without gross negligence, driving under the influence, and driving with a blood alcohol level over 0.08 percent. Acuna was sentenced to a term of 15 years to life in prison.

Acuna's sole contention on appeal is that vehicular manslaughter without gross negligence is a lesser included offense of gross vehicular manslaughter while intoxicated, and therefore she should not have been convicted of both offenses. As the People concede, this contention has merit. Accordingly, we order the conviction for the lesser offense stricken. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*¹

On the evening of January 29, 2006, appellant Acuna drove a black Cadillac northbound on Woodman Avenue in Los Angeles at approximately 70 miles per hour, which was twice the posted speed limit. After nearly colliding with a fire truck, she ran a red light and broadsided a vehicle being driven by Luz Carballo-Coral. Carballo-Coral died from her injuries while being transported to a hospital. Acuna exhibited signs of being under the influence and smelled of alcohol. A blood test revealed her blood-alcohol content was .26 percent. Acuna had suffered three prior convictions for driving with a blood-alcohol content over 0.08 percent.

2. *Procedure.*

Trial was by jury. Jurors were unable to reach a verdict on count 1, murder, and that charge was dismissed in the interests of justice (Pen. Code, § 1385).² Acuna was convicted of gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)),

¹ Because the facts underlying the offenses are not directly relevant to the issue presented on appeal, we limit our discussion to a brief summary of the evidence.

² All further undesignated statutory references are to the Penal Code.

vehicular manslaughter without gross negligence (former § 192, subd. (c)(3)),³ driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)), and driving with a blood alcohol level of 0.08 percent or higher (Veh. Code, § 23152, subd. (b)). The jury further found true allegations that Acuna had suffered three prior convictions for driving under the influence within the meaning of Vehicle Code sections 23550 and 23550.5, subd. (b). The trial court sentenced Acuna to a term of 15 years to life in prison. It ordered that Acuna pay victim restitution and imposed a restitution fine, a suspended parole restitution fine, and a court security fee. Acuna appeals.

DISCUSSION

Acuna could not properly be convicted of both count 2 and count 3.

Acuna was convicted in count 2 of gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)), and was sentenced to a term of 15 years to life on that count. She was convicted in count 3 of vehicular manslaughter without gross negligence (§ 192, subd. (c)(3)), and was sentenced to a term of 2 years, stayed pursuant to section 654. Acuna asserts she could not properly be convicted of both crimes, as the latter is a lesser included offense of the former. The People concede the point, and we agree.

A defendant may not be convicted of both an offense and a lesser included offense. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) A lesser offense is necessarily included in a greater offense if the statutory elements of the greater offense include all the elements of the lesser offense, so that the greater cannot be committed without also committing the lesser. (*People v. Montoya, supra*, at p. 1034 [if a crime “ ‘cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former’ ”]; *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228; *People v. Lopez* (1998) 19 Cal.4th 282, 288; *People v. Binkerd, supra*, 155 Cal.App.4th at p. 1147.) Accordingly, to determine whether an offense cannot be

³ Effective January 1, 2007, the offense formerly specified in section 192, subdivision (c)(3), vehicular manslaughter while intoxicated, was replaced by section 191.5, subdivision (b). (*People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1146.) All further references to section 192, subdivision (c)(3), are to the former section.

committed without necessarily committing the included offense, we look to the statutory definitions of both offenses. We do not consider the evidence offered in support of the conviction or the allegations of the accusatory pleading. (*People v. Reed, supra*, 38 Cal.4th at pp. 1228, 1229; *People v. Marquez* (2007) 152 Cal.App.4th 1064, 1068; *People v. Cheaves* (2003) 113 Cal.App.4th 445, 454; *People v. Reed* (2000) 78 Cal.App.4th 274, 281.)

Section 191.5, subdivision (a), defines the offense of gross vehicular manslaughter while intoxicated. The statute provides: “Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.”

When Acuna’s offense were committed, former section 192, subdivision (c)(3) defined vehicular manslaughter without gross negligence as an unlawful killing without malice, committed by “[d]riving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.” (Former § 192, subd. (c)(3); *People v. Binkerd, supra*, 155 Cal.App.4th at p. 1147.)

A comparison of the two statutes demonstrates that both offenses require the unlawful killing of a human being, without malice, committed by driving a vehicle while intoxicated in violation of Vehicle Code section 23140, 23152, or 23153. Under both statutes, the killing must have resulted either from commission of an unlawful act, not amounting to a felony, or a lawful act that might produce death, committed in an

unlawful manner. The only difference between the crimes is that the offense of gross vehicular manslaughter requires that the defendant acted with gross negligence, while vehicular manslaughter without gross negligence does not. (See generally *People v. Fields* (1996) 13 Cal.4th 289, 300, fn. 2.) Therefore, it is readily apparent that one cannot commit gross vehicular manslaughter while intoxicated without also necessarily violating section 192, subdivision (c)(3). (See *People v. Montoya, supra*, 33 Cal.4th at p. 1034.) Accordingly, we order the conviction for the lesser offense, vehicular manslaughter without gross negligence (§ 192, subd. (c)(3)), stricken. (*People v. Medina* (2007) 41 Cal.4th 685, 701, 703.)

DISPOSITION

Acuna's conviction in count 3, vehicular manslaughter without gross negligence in violation of former section 192, subdivision (c)(3), is ordered stricken. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections. In all other respects, the judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.